

# Is it a Dance or is it Chicken?

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I cut my teeth studying the German Constitutional Court's (GCC) relationship with the European Court of Justice (ECJ). A [recent article](#) in the Financial Times used the metaphor of a dance to explain the GCC's history of pushing back against the ECJ's authority. In 2001, I [called it](#) a game of chicken. I don't worry that playing chicken with the ECJ inevitably leads to European disintegration. The GCC's ECB ruling is, however, the wrong decision issued at the wrong time. I agree with [Martin Wolf](#) that economic policy-makers will and should ignore the ruling, and for this reason I expect the GCC to step back from the brink, once again. But harm is nonetheless being inflicted on a tottering global economy, a fragile European project, and a disintegrating popular support for the rule of law.

The GCC has been here before – in the hot seat being lambasted by critics for hastening European disintegration. Its 1974 [Internationale Handelsgesellschaft ruling](#) insisted that the GCC would act as the final arbiter of European law supremacy inside of Germany so long as ('*solange*') the European Community lacked 'a catalogue of fundamental rights decided on by a parliament of settled validity.' In the 1970s, this seemed like an impossible hill for the European Community to climb. The GCC swerved before the EU reached the mountain top, and amazingly the EU climbed the mountain.

The GCC has repeated its chicken strategy, often to good ends. When in 1993 the GCC issued its [Maastricht ruling](#), threatening to declare ultra vires European acts inapplicable in Germany, the EU met Germany more than halfway in soliciting political authorization and avoiding the 'ultra-vires' charge. The GCC also played a background role in the '[Kadi](#)' saga, and its behind-the-scenes pressure positively contributed to the ECJ's demand for serious individualized justifications for freezing the assets of individuals, which led the UN Security Council to pass new rules and better justify decisions to classify a person as a funder of terrorists. These examples produced good ends because the purpose was legal accountability that pressured international political actors to better justify their decisions, to take human rights more seriously, and to respect national democratic and constitutional decision-making processes.

This time, however, the GCC has entangled itself in a policy debate about what is the best monetary policy. This time, the GCC is playing a judicialized version of what political scientists call a '[two level negotiation game](#)'. When German decision-makers can plausibly claim a hard domestic political constraint, such as a constitutional constraint, then other actors at the bargaining table are more likely to move towards the German position. The GCC's intervention seems designed to strengthen German voices in political bargaining, but this is the wrong way to deploy.

I don't worry that the GCC seems to have carried through with its threat to declare an 'ultra vires' European act inapplicable. It [has actually done this before](#), and if EU

policy is deficient and uncorrected, the GCC should do so again. Nor do I worry that [Poland and Hungary may be tempted to pervert the GCC's precedent in nefarious ways](#). These countries' leaders and their stacked supreme courts will do so no matter how the GCC had ruled.

I do worry that the GCC has acceded to the plaintiffs' policy desire, ordering the Bundesbank to ignore both the ECB and the ECJ. In the past we could believe that the GCC wanted to protect human rights, democracy and the rule of law. Can we believe this now? For me, three factors make this particular ruling especially pointless and dangerous: 1) the ruling involves monetary policy, 2) the current context is one of [radical uncertainty](#), and 3) the European and democratic projects are especially vulnerable.

The true hubris of the GCC's ECB decision ruling is the belief that the GCC can better determine monetary policy. Monetary policy is a [Keynesian beauty contest](#). Because there is no objective way to know 'who is the prettiest,' betting on the beauty contest involves picking what you think other selectors will choose. Said differently, monetary policy is a signal that tries to encourage lenders, borrowers, and consumers to keep the spending machine going so that the economy does not seize up. There is no 'right' signal. There is only a confidence game.

Since the 1930s, the German confidence game has involved price stability. We can understand Germany's past inflation trauma. Yet for years economists have been rethinking the conventional wisdom about inflation. Actual hyper-inflation is bad. But old understandings of [how loose monetary policies contribute to inflation](#) have been turned on their heads. Most economists outside of Germany, and many within, believe that the old German orthodoxy is outdated and overly-conservative. Yet the ECB is constrained by this orthodoxy, and it takes price stability into account even though in recent years deflation has been a greater risk than inflation. But in contexts of radical uncertainty, one cannot know the downstream effects of a decision. Because the 'risk' that a bond-buying policy will create inflation is unknowable, as a policy matter, the litigants and the GCC are wrong. Nor does the ruling provide a helpful legal check. The ECB, with the support of European leaders, made a reasonable decision for justifiable reasons. The ECB and Bundesbank – not the GCC – have the political authority to make these decisions. Why the GCC thinks the [legal strategy of 'proportionality balancing' will do better is baffling](#).

I am not a blind member of the 'central bank independence' fan-club. The entire financial sector needs more sunlight and accountability. But the solution is not to insert German judges into Euro-monetary policy-making. The current moment is even more fragile than Greek and Eurozone financial crisis, when the [GCC first suggested that it would intervene in European monetary policy](#). I don't know what the right monetary strategy is for this moment, but I do know that the German constitution and German constitutional judges do not know better. I see no upside to the GCC seemingly joining the populists in rejecting expertise and the valid exercises of political authority. We have a pandemic producing depression-level economic contractions, and accountable political leaders need to be able address popular concerns about austerity. If price-stability-induced conservatism or more economic turmoil are a result, then liberal democracy may be further threatened.

The best political and legal strategy for monetary policy in times of radical uncertainty is to let the ECB duke the issue out with the various national central banks, insulated from yet influenced by EU political leaders. The GCC and the ECJ already made them justify their decisions. If they still mess up, central bankers will be held accountable by economic actors and the political process.

The GCC needs to figure out when national constitutional checks are [an appropriate and helpful part of an international system of democratic checks and balances](#). As far as I know, no judicial body has been foolish enough to insert itself into the monetary policy-making process, for good reason. The GCC should not be putting a hand on the German scale of price stability. Here is a guide: The GCC is most helpful when it defends human rights, democracy, German federalism, and a reasoned respect for domestic and international law. The goal is a [culture of constitutional obedience](#), not an enhanced German voice, a German fiat over international policy-making, or an arrogant suggestion that experts and European institutions lack the authority while German Constitutional judges know how to navigate radical uncertainty.

